Nos. 77-1539, 77-1770 and 77-6908

In the Supreme Court of the United States

OCTOBER TERM, 1977

STEPHEN K. EASTON, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM HOCKRIDGE, PETITIONER

v.

UNITED STATES OF AMERICA

CHARLES PETRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 573 F.2d 752. The opinion of the district court (Pet. App. B) is unreported.

[1] "Pet. App." refers to the appendix to the petition in No. 77-1539.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1978. Petitions for rehearing (in Nos. 77-1770 and 77-6908) were denied on May 15, 1978. The petitions for a writ of certiorari were filed on April 26, 1978 (No. 77-1539), June 13, 1978 (No. 77-6908) and June 14, 1978 (No. 77-1770). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to set aside a partial verdict because two jurors expressed misgivings about their votes while the jury was still deliberating on additional counts.

2. Whether the trial court's interview with those jurors, undertaken with the consent of defense counsel, was improper or coercive (Nos. 77-1539 and 77-1770).

3. Whether the trial court erred in failing to poll the jury separately as to each defendant on the conspiracy count (Nos. 77-1539 and 77-1770).

4. Whether the trial court abused its discretion in admitting evidence of petitioner Easton's complicity in other crimes and of his financial condition (No. 77-1539).[2]

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[2] Hockridge's petition lists three additional "Questions Presented" (Pet. 3), but he does not discuss these points in his argument. Since these issues are adequately addressed in the court of appeals' opinion (Pet. App. A-5 to A-7, A-15), we will not discuss them here.

RULE INVOLVED

Rule 606(b), Fed. R. Evid., provides:

> *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of misapplying the moneys and assets of a bank, and of conspiracy to do so, in violation of 18 U.S.C. 371, 656, and 2 (Pet. App. A-2 to A-3). Petitioner Petri was also convicted of preparing a false financial statement for the purpose of influencing the Chemical Bank to make a $75,000 loan, in violation of 18 U.S.C. 1014 (Pet. App. A-3). Petri was sentenced to four years' imprisonment on

each of two counts and two years on the final count, all sentences to run concurrently (Pet. App. A-3 n. 4). Petitioner Easton was sentenced to six months' imprisonment, fined $5,000, and placed on probation for three years (*ibid.*). Petitioner Hockridge was sentenced to nine months' imprisonment and placed on probation for three years (*ibid.*). The court of appeals affirmed in a thorough opinion on which we principally rely (Pet. App. A).

1. The evidence showed that petitioners conspired to defraud the Chemical Bank and the Bank of New York by means of a loan scheme based upon the submission to these banks of false corporate financial statements. Chemical Bank ultimately lost more than $1,100,000 on these loans (Pet. App. A-4).

In June 1971, petitioner Petri acquired a debt-ridden public corporation, Zavala-Riss Productions, which he subsequently renamed Cine-Prime Corporation (Tr. 1914-1954; 2089). Shortly after the purchase, Petri began to build a conglomerate by acquiring Comprehensive Sports Planning, Inc. (CSPI) with the promise that the stockholders of CSPI could exchange their shares for stock in Zavala-Riss (Tr. 1576-1581). At the time CSPI was acquired by Petri, petitioner Easton was CSPI's accountant and a minority stockholder (Tr. 1578). Shortly after the acquisition of CSPI, Easton agreed to be the accountant for Petri's emerging conglomerate in exchange for a salary plus a substantial amount of the stock in Zavala-Riss (Tr. 1583-1587).

Petri gained the support of petitioner Hockridge, then assistant vice president and loan officer of the Chemical Bank, by satisfying $58,000 in loans the latter had previously approved to third parties, and later by diverting to Hockridge's checking account $14,000 of a $75,000 loan Hockridge approved for one of Petri's companies (Pet. App. A-4). Petri also provided Hockridge with other bribes and gratuities, including a mink coat, golf clubs, and stock (*ibid.*).

From September 1971 to June 1972, Hockridge approved more than 20 unsecured corporate loans to companies controlled by Petri (Pet. App. A-3 to A-4). The rules of the Chemical Bank prohibited its loan officers from unilaterally approving loans in excess of $75,000 to two or more corporations controlled by the same party or parties (Tr. 539-543). To make it appear to bank officials that the loans approved by Hockridge were unrelated, Easton and Petri had a number of employees sign corporate promissory notes and corporate resolutions as officers of the various corporations within the conglomerate that were to receive loans from the bank (Tr. 639-675; 868-882; 1267-1304; 1352-1377; 1999-2004; 2174-2182; 2405-2425). Hockridge then prepared fictitious reports for the bank files indicating that before approving the loans he had spoken with corporate officers about the loans and their repayment.[3]

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[3] Numerous government witnesses testified that these representations that Hockridge had spoken to them were false (Tr. 639-675, 1036-1040, 1267-1304, 1406-1410, 2742-2757, 2719-2724, 2405-2425, 1943-1946, 2913-2916).

For all but two of the corporate loans approved by Hockridge at Chemical Bank, Easton prepared unsigned corporate financial statements which he and Petri submitted to Hockridge (Pet. App. A-4).[4] These financial statements grossly overstated the assets of the corporations on whose behalf loans were sought.[5] Hockridge was aware that these statements were false; on one occasion he told a government witness to warn Petri and Easton "to come down off some of these wild balance sheets" (Tr. 1035). Easton and Petri then manipulated the loan proceeds, paying off loans to one corporation with part of the proceeds of loans to others, in order to create the impression that the corporations making up the conglomerate were viable entities doing a substantial volume of business.

Easton was also instrumental in obtaining a $150,000 loan from the Bank of New York for Todays Stores Services, Inc., one of the companies in the conglomerate. Easton told a Bank of New York loan officer that he was the treasurer of Todays Stores and that the company was part of a group of businesses controlled by Cine-Prime Corporation. He

[4] Robert Fillet, who had been employed by Petri as a consultant, testified that Easton told him that he (Easton) was not concerned about the false statements that he had prepared because he had not signed them (Tr. 1637-1638).

[5] For example, Easton listed $261,800 in assets in the Cord Automobile Co. financial statement, and $189,918 in assets in the Talmadge Furniture Co. financial statement, when two months previously Petri had acquired all of the assets of both companies from the bankruptcy court for one hundred dollars (Tr. 1440-1450).

stated that the group did all its business at Chemical Bank, but that Cine-Prime Corporation was growing so rapidly that its banking relationships needed to be expanded (Tr. 3137-3138). After Easton submitted two false financial statements to the Bank of New York, it agreed to extend the $150,000 loan (Gov't. Exs. 26(f)(1), 26(f)(2); Tr. 3143, 3150). Some of the proceeds from this loan went to Easton, who received $2,500 plus an additional $15,000 that was used to pay off a Chemical Bank loan to his company, Tax by Telephone (Tr. 2540-2570).

2. The jury began its deliberations on Friday morning, February 11, 1977 (Pet. 7). It reconvened on Monday morning and continued deliberations. At the end of the day the district judge indicated that he intended to exercise his prerogative under Fed. R. Crim. P. 31(b) to ask the jury whether it had reached a partial verdict (Tr. 5897, 5900).[6]

In response to the court's inquiry, the jury announced a verdict of guilty as to Petri, Easton, and Hockridge on Count One, the conspiracy count (Tr. 5901-5902). The court then asked counsel if they wanted the jury polled; and although only counsel for Hockridge responded affirmatively, the jurors were asked whether they found all three defendants guilty on Count One. Each juror responded affirmatively, and the verdicts were recorded (Tr. 5902).[7]

[6] Petitioners did not object to the district court's decision to take a partial verdict, nor challenge the district court's authority to do so pursuant to Rule 31(b) (Tr. 5880-5901).

[7] At this time, petitioners made no request that the jury be individually polled as to each defendant (Tr. 5901-5902).

On Tuesday, February 15, at approximately 5:00 p.m., the judge announced that he had received a note from Juror Number Four asking to see him (Tr. 5909). After receiving the views of counsel, the court stated that he did not intend to interview Juror Four until the jury concluded its deliberations (Tr. 5909-5914). However, when the jury reconvened the next morning, the court received a note from Juror Number Three asking to see the judge and stating that she believed she had committed an injustice by rushing into a verdict (Tr. 5920).

With the consent of petitioners' counsel, the court conducted an *in camera* interview with Jurors Three and Four (Tr. 5921-5924). At the interview, the two jurors expressed misgivings about the verdict on Count One (Tr. 5928-5932). The court reminded the jurors that he did not want them to surrender their honest convictions because of other jurors, and he suggested that they resume deliberations and discuss their concerns with the other members of the jury. The judge also mentioned the possibility that the jurors could discuss the problem further with him later (Tr. 5927-5935).

Following the *in camera* interview, the court denied the motion by all defendants to set aside the verdict on Count One, and he also denied Easton's request to have the jury polled individually as to him on Count One (Tr. 5935-5942).

The next day, at approximately 2:00 p.m., the jury informed the court that it had reached verdicts on three additional counts (Tr. 5967-5968). The jury

found petitioners guilty on Count Two and acquitted them on Counts Three and Four (Tr. 5969-5970). The jurors were polled, and each agreed that this was his verdict (Tr. 5970). The following day after the jury announced partial verdicts on nine more counts,[8] the court discharged the jury and dismissed the remaining 11 counts (Tr. 5996-6001, 6021-6023). The court denied post-trial motions to set aside the verdict because of jury misconduct, refusing to permit petitioners to interview Jurors Three and Four because they could not impeach their own verdict, and holding that even if the two jurors' statements were to be considered in ruling on the motion, they had not surrendered their honest convictions in finding petitioners guilty on Count One (Tr. 6041-6046; Pet. App. A-18 to A-19).

ARGUMENT

1. Petitioners contend that the trial court erred in refusing to set aside the partial verdict or to order redeliberation after Jurors Three and Four expressed misgivings about their votes. They urge that since the verdicts on Count One were not unanimous, reversal is required.

a. Petitioners rely upon the statements of Jurors Three and Four to demonstrate the jury's lack of unanimity. These jurors stated that they had doubts about their verdict on Count One that had not been

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[8] Petitioner Petri was convicted on one additional count, and otherwise petitioners were acquitted on each of these counts (Tr. 5971-6021).

resolved and that they had been rushed into a verdict by pressure from the other jurors. The answer to this contention, however, is that the statements of the two jurors, reciting no *outside* influence and coming after the verdict on Count One had been rendered, confirmed by a poll of the jury, and recorded, were too late to impeach the result.

As the court of appeals correctly concluded, Fed. R. Evid. 606(b) explicitly forbids recourse to evidence of this nature in order to impeach a verdict. The Rule provides that "[u]pon an inquiry into the validity of a verdict * * * a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith * * *."[9] The focus of Rule 606(b) and its judicial antecedents is on the "insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process." Notes of the Advisory Committee on Proposed Rules, Fed.

[9] Rule 606(b) does not bar a juror's testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror." Petitioners do not contend that any such extraneous influence was exerted upon any juror.

R. Evid. 606(b), 28 U.S.C. App. (Supp. V), p. 2331. Forbidding inquiry into these matters is intended to encourage free and open discussion among the jurors, to promote the stability and finality of verdicts, to protect jurors against annoyance and embarrassment, to discourage jury tampering, and to prevent fraud by jurors. *McDonald* v. *Pless*, 238 U.S. 264, 267-269; *Mattox* v. *United States*, 146 U.S. 140, 148-149; *United States* v. *Eagle*, 539 F.2d 1166, 1170 (C.A. 8), certiorari denied, 429 U.S. 1110; *Government of the Virgin Islands* v. *Gereau*, 523 F.2d 140, 148-150 (C.A. 3), certiorari denied, 424 U.S. 917; *United States* v. *Green*, 523 F.2d 229, 235 (C.A. 2), certiorari denied, 423 U.S. 1074; Advisory Committee Notes, *supra*, Rule 606(b).

To be sure, petitioners argue that Rule 606(b) should not be applied where the jurors' statements were made before the jury had been finally discharged. But the distinction petitioners seek to draw is not supported by the language of Rule 606(b), which applies "[u]pon an inquiry into the validity of a verdict," not upon the discharge of the jury. See *Vizzini* v. *Ford Motor Co.*, 72 F.R.D. 132 (E.D. Pa.), vacated and remanded on other grounds, 569 F.2d 754 (C.A. 3).[10] Moreover, the policy considerations underlying

[10] Petitioner Petri urges (Pet. 13-15), notwithstanding the language of Rule 606(b), that as a general rule "the cut-off point for finality"—after which a juror's statements may not be received to impeach a verdict—is the time of the jury's discharge. An examination of the cases cited in support of this contention, however, reveals that although many hold that statements made after discharge are not admissible to impeach

Rule 606(b) are applicable to partial verdicts as well as to complete verdicts. Congress adopted the Senate version of Rule 606(b), which was based upon the view that any inquiry into the mental processes of the jurors would be undesirable. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 13-14 (1974); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 8 (1974). Indeed, inquiry into the jury's deliberations while the jury is still considering its verdict on additional charges may well be more intrusive than inquiry after the jury has been discharged. Rule 606(b) also serves the interest of ensuring the finality of verdicts. As the court of appeals recognized, partial verdicts are intended to give finality to a part of the case upon which the jurors have reached agreement. The partial verdict thus serves as a "hedge" (Pet. App. A-14) against the possibility that events during the course of long deliberations might require retrial of the entire case. Allowing the impeachment of partial verdicts whenever a juror has second thoughts frustrates the goal of giving final effect to that part of the litigation, and thus defeats the purpose of taking a partial verdict. As petitioner Petri recognizes (Pet. 16), this would render partial verdicts no more than "tentative, working hypotheses."

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the verdict, none deals with the situation where the juror's impeaching statements are made after the verdict is recorded but before discharge. These cases thus furnish no precedent for disregarding the express terms of Rule 606(b), which bar the admission of a juror's statements once a verdict has been recorded, *i.e.*, "[u]pon an inquiry into the validity of a verdict."

As the court of appeals correctly concluded (Pet. App. A-14), there were "no reasons of sufficient magnitude to depart from the normal rules governing impeachment of jury verdicts" simply because the verdict in the instant case was a partial one, and accordingly the statements of Jurors Three and Four were not admissible to impeach the verdict on Count One.

b. In any event, even if the jurors' statements are considered, the record supports the court's finding (Pet. App. A-10) that neither juror had "surrender[ed] [her] honest convictions," and thus the verdict on Count One represented the unanimous decision of the jurors. The trial judge had firsthand knowledge of the case, and he observed the two jurors when they were polled on each count, including the count about which they later expressed doubts. After the *in camera* interview, the jurors in question returned to their deliberations, and the trial judge had an opportunity to observe the interaction of the jury on the days that followed as they reviewed additional evidence and reached verdicts on one count after another. The day following the *in camera* interview, Jurors Three and Four joined the remainder of the jury in finding petitioners guilty on a second count, and neither of them expressed any doubts about this verdict when she was polled. The jury subsequently announced its verdict on 11 more counts, and in each instance Jurors Three and Four agreed with these verdicts when polled. They expressed no further doubts or concerns. Accordingly, even considering the

jurors' statements of their second thoughts, the record supports the trial judge's finding that both jurors had voluntarily assented to the jury's verdict on Count One.

Since the jury's verdict on Count One was unanimous, there was no ground for setting aside the verdict or ordering the jury to redeliberate on that Count.[11]

2. Petitioners Easton and Hockridge also contend that the court's *in camera* interview with the jurors was improper. First, they urge that the judge gave the jurors private instructions of the type disapproved in *United States* v. *Gullia*, 450 F.2d 777 (C.A. 3). To the contrary, however, the record demonstrates that the trial judge's comments to Jurors Three and Four were a far cry from the "additional instructions" in *Gullia*, where before any verdict had been recorded the court "instructed the juror, again and again, during the conference upon the meaning of 'aids, abets, counsels, commands, induces or procures,'" and responded to the juror's question about the effect of her holding out with the comment "'[i]t would mean that we have just wasted two weeks * * *.'" 450 F.2d at 778-779. Here, in contrast, the

[11] Petitioner Petri urges (Pet. 2) that this case presents the question whether the errors affecting Count One, the conspiracy count, also require reversal of the substantive counts, since the jury was instructed that members of the conspiracy could be found guilty of substantive crimes carried out in furtherance of the conspiracy (see Pet. 5). Since, as we have shown, the verdict on Count One was not defective, we need not reach this question.

in camera interview was devoted primarily to the judge's effort to learn the basis of each juror's concerns. The judge made no attempt to reinstruct the jurors: indeed, although Juror Three asked what constituted a reasonable doubt (Tr. 5931), the judge did not repeat his instructions on this point, or any other.

The record likewise provides no support for petitioners' related contention that the judge's comments during the interview were coercive and tantamount to an *Allen* charge on Count Two.[12] Before asking the two jurors to return to the deliberations, the judge reminded them that he did not want them to surrender their honest convictions, suggested that they get "hardened to" the fact that "Jurors disagree inevitably," and advised them to relax and "see how it goes today" (Tr. 5931-5932). As the court of appeals correctly concluded, this conduct "was the opposite of coercive" (Pet. App. A-15), and it bore no resemblance to an *Allen* charge.

3. Petitioners Easton and Hockridge next contend they were denied their right to have the jury polled on Count One separately as to each of them. How-

[12] Petitioners also suggest that the two jurors may have been coerced to give up their doubts on Count One. As the court of appeals correctly noted, the trial judge's suggestion that the two jurors raise their concerns about Count One with the other jurors was clearly not coercive, although under the court of appeals' construction of Fed. R. Evid. 606(b) it was error to suggest that the verdict on that count could be reconsidered (Pet. App. A-15 n. 20). That error, however, would favor rather than prejudice petitioner.

ever, although the court inquired whether any of the defendants wished to have the jury polled on Count One, neither requested that the jury be polled separately as to each defendant (Tr. 5902). Indeed, Easton did not request a poll at all. Since petitioners made no timely request, they cannot now complain that a single poll for the three defendants was insufficient. Fed. R. Crim. P. 31(d); *United States* v. *Marr*, 428 F.2d 614 (C.A. 7); *United States* v. *Neal*, 365 F.2d 188, 190 (C.A. 6).

4. Petitioner Easton contends (Pet. 30-35) that the district court erred in admitting evidence that petitioner characterizes as irrelevant and prejudicial. This contention is without merit.

a. Easton first argues (Pet. 30-32) that the district court improperly admitted evidence showing that he failed to withhold taxes from the paychecks he prepared for employees of corporations within the conglomerate. The answer is that evidence of other crimes, although inadmissible to prove the actor's criminal character or disposition, is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b).

The evidence in question was introduced to establish the fact—which the defense vigorously disputed —that corporations formed by Petri existed only on paper for the purpose of obtaining fraudulent loans from the Chemical Bank. Evidence showing that Easton failed to withhold taxes from "employees'" paychecks drawn on the accounts of these corporations clearly supported this inference, and was properly admitted as proof of the conspirators' fraudulent plan.

b. Easton also urges (Pet. 32-33) that the district court erred in allowing the government to elicit on cross-examination the fact that his net worth had increased by more than $2,000,000 from 1972 to 1974 (Tr. 5033). He contends (Pet. 32) that "[t]here was no evidence that [he] derived personal benefit from the loans made to the corporate borrowers," and charges that the government's purpose in introducing the irrelevant evidence of his increased net worth was to mislead and prejudice the jury. But the fact is that the government presented evidence showing that Easton had diverted loan funds to a personal checking account (Tr. 4890-4895). Moreover, a large part of the proceeds of the $1,100,000 loans petitioner and his co-defendants procured are still unaccounted for. In these circumstances, there was nothing improper in questioning Easton about whether he used some of this money to finance various business ventures that had significantly increased his net worth (Tr. 5003-5034). See *United States* v. *Tramunti*, 513 F.2d 1087 (C.A. 2), certiorari denied, 423 U.S. 832. In any event, Easton failed to object to this line of questioning, thus waiving the issue on appeal.

c. Easton also argues (Pet. 33-34) that the district court erred in admitting into evidence financial statements that he contends were not properly au-

thenticated and constituted hearsay. The contention that the financial statements were hearsay is without merit. Since the statements were not admitted as evidence of the truth of the matters reported therein (indeed the government sought to show they were false), they did not constitute hearsay. Fed. R. Evid. 801(c). His contention that the statements were not authenticated is equally unavailing, since there was ample evidence to establish they were what the government claimed—the statements submitted to Hockridge to justify loans to the Cine-Prime conglomerate. See Fed. R. Evid. 901(a). The statements were admitted as part of the corporate loan files of Chemical Bank (Tr. 116-117). Hockridge testified that these financial statements were the ones given him during the course of the conspiracy (Tr. 3542-3544). In any event, since Easton did not object to the admission of the documents on the ground they were unauthenticated, he has waived any objection he might have made.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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